Supreme Court, U.S.
FILED
OCT 23 1991
OFFICE OF THE CLERK

(2)

No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY D'AMATO
(Counsel of Record)
SCHOOL OF LAW
NORTHWESTERN UNIVERSITY
357 East Chicago Avenue
Chicago, Illinois 60611
Tel: (312) 503-8474
Fax: (312) 266-8305

Counsel for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a foreign instrumentality that procured the torture of an American citizen for doing the job its agent hired him in the United States to do.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a foreign country under the color of whose law an American citizen was tortured for doing the job its agent hired him in the United States to do.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE PETITION	1
I.	
There is no issue of "exercise of police power" in the record	1
II.	
Respondent Vivian Nelson's non-derivative claims cannot be brushed aside	4
III.	
The statute in this case has been construed according to its plain and ordinary meaning	6
IV.	
There is no conflict in the Circuit Courts regarding the application of the FSIA to extra-territorial torts that are based upon commercial activity in the United States	8
V.	
Petitioners' attempt to wrap their cause in the American flag may misrepresent the present position of the United States	14
CONCLUSION	18

INDEX TO APPENDIX

A—Request for Espousal of Claims	1a
B—Letter of March 2, 1991, from His Excellency Bandar bin Sultan to the Honorable James A. Baker III	16a
C—Letter of March 25, 1991, from the Honorable Edwin D. Williamson, the Legal Adviser, to His Excellency Bandar bin Sultan, Ambassador of the Kingdom of Saudi Arabia	17a

TABLE OF AUTHORITIES

Cases	PAGE
America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989)	11
Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980)	10
Barkanic v. General Admin. of Civil Aviation, 822 F.2d 11 (2d Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 453 (1987)	9
Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct. 510 (1984)	11
Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982)	12
Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 237 (1989)	11
Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985)	7
Memorial Hospital of Iowa County, Inc. v. United States Dept. of Health & Human Services, 862 F.2d 1299 (7th Cir. 1988)	16

Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991) ..... *passim*

Santos v. Compagnie Nationale Air France, 934 F.2d 890 (7th Cir. 1991) 7, 8, 10, 11

Schoenberg v. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991) 10

Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980) 9

United States v. Munsingwear, 340 U.S. 36 (1950) .. 16

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 13

Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988) 12

Statutes

18 U.S.C. § 1605(a)(2) (1988) ..... *passim*

18 U.S.C. § 1605(a)(5)(B) 11

Other Authorities

Department of State, *Country Reports on Human Rights Practices for 1989* 5

Rules of the Supreme Court of the United States, Rule 15 3

No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THERE IS NO ISSUE OF "EXERCISE OF POLICE POWER" IN THE RECORD.

The Petitioners have misstated the holding of the Court of Appeals. Contrary to the Petitioners' boldface claim, the Eleventh Circuit did *not* hold that the "exercise of police power" constituted "commercial activity" under the FSIA. That issue was *never* in the case because the only document in the case is the Respondents' Complaint filed

in district court. There was no Answer filed by the Petitioners. There was no discovery. There were no interrogatories. Neither side ever alleged any facts pertaining to "exercise of police power." Neither the district court's memorandum opinion nor the Eleventh Circuit's unanimous opinion refer to or say anything about "exercise of police power."

This is a case only of the subject-matter jurisdictional sufficiency of the Complaint. If the Petitioners wish to defend on the ground of sovereign immunity, they have the burden of raising that defense in their Answer, and answering appropriate interrogatories, at the trial court level. They have not yet answered the Complaint, much less discharged the burden.

The issue of "exercise of police power" is spurious, invented perhaps to cast in a false light the importance of this case for the purpose of obtaining a writ of certiorari. Consider what would happen if this Court were to grant the writ of certiorari and hear oral argument. The Justices might pose questions such as "Who arrested Mr. Nelson?" or "When was he arrested—before or after he was tortured?" or "On what charge was he arrested?" or "Why didn't the persons who picked him up identify themselves or notify Mr. Nelson that he was being arrested?" or "Why wasn't Mr. Nelson ever charged with a crime?" or "Why wasn't Mr. Nelson ever brought before a magistrate—or tried—or convicted—or sentenced?" or "What facts support the Petitioners' claim that this is a case of malicious prosecution?" or "Do the Petitioners claim that torturing Mr. Nelson constitutes the exercise of police power?" Yet none of these questions or their cognates could be answered in oral argument because there are no facts in the record about any of these issues. Counsel would be reduced to conflicting and rank speculation; the

oral argument would degenerate into an exercise in futility. This is exactly what Supreme Court Rule 15 was designed to prevent.[1] As Rule 15 states, "the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later."

But even if—in the interest of judicial economy and out of concern for the sensibilities of foreign sovereigns called to account in American courts—the Court might want to speculate at this stage whether or not the torture[2] of Mr. Nelson was an "exercise of police power," there is no assurance that Saudi Arabia or its instrumentalities, when they file an Answer in this case upon remand, will actually make such a claim.[3] If they did, their claim could be unprecedented in the history of law. Respondents are not aware of any case, national or international, in which a government has ever attempted to justify or excuse torture as an "exercise of police power." To the contrary, torture is universally condemned as a heinous violation

---

[1] There are other significant misstatements of fact and law in the Petition, which will be addressed later in the course of this Brief.

[2] Mr. Nelson's claim of torture is not a frivolous allegation made for the purpose of obtaining jurisdiction. *See* the summary of evidence of torture in "Request for Espousal of Claims," filed in the Eleventh Circuit, and reprinted as Appendix A to this Brief.

[3] The same is true of the United States if the situation were reversed. Thus, Petitioner's claim that this case implicates important foreign relations issues is wildly overstated. In addition, for reasons to be discussed later in this Brief, Petitioner's claim may not even fairly represent the current position of the United States.

of human rights. In Saudi Arabia, as in nearly all countries, torture is a crime. But even more significantly with respect to Saudi Arabia, torture is a grave sin against the Koran: he who tortures another will himself be tortured in the afterlife. Thus, the very assumption that Saudi Arabia will answer upon remand that the torture of Mr. Nelson was an "exercise of police power" could itself be offensive to the sovereign's religious sensibilities! The Respondents make no such assumption, and see no reason why this Court should make it. All along Respondents have claimed only that Mr. Nelson was tortured under color of law.

II.

RESPONDENT VIVIAN NELSON'S NON-DERIVATIVE CLAIMS CANNOT BE BRUSHED ASIDE.

There are two Respondents in this case, Scott Nelson and Vivian Nelson. Petitioners have proceeded as if Vivian Nelson is a non-person. In footnote 3 of the Petition, at page 2, Petitioners state:

> "Respondent" as used in the singular herein shall refer to Scott Nelson only, unless otherwise indicated, because Vivian Nelson's claims are entirely derivative.

But the Complaint clearly alleges that

> 13. During the 39 days in which Plaintiff, SCOTT NELSON, was held captive, he was held incommunicado, and his family was not advised of his whereabouts for several days. Once his wife, VIVIAN NELSON, was advised of his situation, she was informed by an agent of SAUDI ARABIA that he could be released in exchange for sexual favors.
>
> 29. [T]he solicitation of sexual favors from Plaintiff VIVIAN NELSON in exchange for her husband's freedom constitutes torture because it caused severe mental pain and anguish in an attempt to coerce her into an action. Further, this treatment was both clearly degrading and an arbitrary and unlawful attack and interference on the Plaintiffs' family life, honor and human dignity.

Since the 21-page double-spaced Complaint is the sole document at issue in this case, it is unlikely that the Petitioners have not read it. Why, then, have they ignored Vivian Nelson's own cause of action? This Court may take judicial notice that Petitioner Saudi Arabia is a nation which legally permits husbands at will to beat and physically discipline their wives, a nation which gives fathers exclusive and unquestioned dominion and control over their children, and a nation which weighs any woman's testimony in court as equivalent to one-half a man's testimony. Have the American attorneys for Saudi Arabia overlooked Vivian Nelson's nonderivative claims because they have subconsciously absorbed some of their client's attitudes toward women? Or are they deliberately attempting to conceal Vivian Nelson's personal claims from this Court?[4] Under either alternative, they vitiate the credibility of their entire Petition by such a tactic.

---

[4] Petitioners invite Scott Nelson and Vivian Nelson to pursue their claims in a Saudi court. Petition at 4 n.5. By labelling Vivian Nelson's claims as "entirely derivative," they downplay the fact that no American court would condone remitting her to a judicial system that would clearly deprive her of due process of law. *See* Department of State, *Country Reports on Human Rights Practices for 1989* at 1557 (legal practices in Saudi courts valuing a woman's testimony as one-half that of a man's testimony).

III.

THE STATUTE IN THIS CASE HAS BEEN CONSTRUED ACCORDING TO ITS PLAIN AND ORDINARY MEANING.

The only statute governing the present case is 28 U.S.C. § 1605(a)(2) of the Foreign Sovereign Immunities Act, which states that "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."

As the Eleventh Circuit found, the Petitioners, themselves and through their agent, engaged in commercial recruitment activity in the United States. They advertised nationally in the *Engineering News* for a Monitoring Systems Engineer to work at the King Faisal Specialist Hospital. Respondent Scott Nelson had a subscription to the *Engineering News* which he received and read at his home in Miami, Florida in September, 1983. He applied for the job and eventually signed and executed the contract of employment in Miami.[5] His job description stated that a monitoring systems engineer "Assures compliance with safety regulations" and "Troubleshoots problems and implements corrective action." *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1535-36 (11th Cir. 1991), Petition at 1a, 16a. Subsequently, in the course of Mr. Nelson's duties at the hospital in Saudi Arabia, he discovered certain safety hazards in the oxygen supply lines. After being unable to

[5] The Petition inaccurately states: "During a respite in the United States from his work in Saudi Arabia, Respondent saw the Hospital's advertisement for an opening in Riyadh." Petition at 3. In fact, Mr. Nelson saw the advertisement for a Monitoring Systems Engineer, placed by the Hospital as agent for King Faisal Specialist Hospital, before he had ever set foot in the Kingdom of Saudi Arabia.

convince his superiors to correct the problem, he reported the safety hazards to an investigative commission of the Saudi government. His "blowing the whistle" embarrassed his superiors at King Faisal Specialist Hospital, who procured his physical torture at the hands of government agents or officials acting contrary to law but under color of law.

Taking the allegations of the Complaint at face value for the purpose of subject-matter jurisdiction, an element of his cause of action is the employment contract he signed in the United States. His torture was an alleged consequence of his legal obligation under the employment contract to monitor safety procedures at the King Faisal Specialist Hospital and to report safety violations. His employers had a correlative duty under the same employment contract to receive Mr. Nelson's recommendations and act upon them in order to ensure the safety of the patients at the hospital. Instead, they arranged to have him tortured. The act of torture, therefore, was clearly "based upon" the terms and scope of his employment under the employment contract he signed and executed in the United States.[6] As the Seventh Circuit said in a very recent case, "an action would be 'based upon' commercial activity in the United States if that commercial activity established the element of breach of duty . . ." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 n.3 (7th Cir. 1991).[7] The Seventh Circuit went on to cite

[6] In contrast, in a case relied upon by the Petitioners, an extraterritorial tort was *not* "based upon" the commercial activity of a foreign instrumentality. Rather, the court held that the foreign instrumentality was a joint tortfeasor and thus, relevant to the plaintiffs' cause of action, not engaged in "commercial activity" at all. *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

[7] The *Santos* decision is discussed further, *infra*.

with approval the *Nelson* decision, stating that in *Nelson* "the court held that jurisdiction was present under the Immunities Act where a foreign government recruited and hired an employee in the United States. The court emphasized that the employee's subsequent detention and torture by the foreign government was for conduct within the scope of his employment duties." 934 F.2d at 894.[8]

The Seventh Circuit's opinion in *Santos* confirms the ease of application of the statute. The core of the present case is that the Respondents' cause of action is "based upon a commercial activity carried on in the United States by the foreign state," as the FSIA provides, because Mr. Nelson was tortured for doing the very job he was hired to do. The *Nelson* decision is a simple application of the plain and ordinary meaning of a statute to a (hopefully) extraordinary and heinous set of facts. The statute itself is the sole, salient, and sufficient basis for subject-matter jurisdiction in the present case, despite the Petitioners' convoluted efforts to argue that the statute does not mean what it says.

IV.

THERE IS NO CONFLICT IN THE CIRCUIT COURTS REGARDING THE APPLICATION OF THE FSIA TO EXTRATERRITORIAL TORTS THAT ARE BASED UPON COMMERCIAL ACTIVITY IN THE UNITED STATES.

The Petition quotes opinions out of context and indiscriminately mixes contract and tort actions in an attempt

[8] It is amazing, but typical, that the Petitioners would cite the *Santos* case as one of the cases of other circuits that is directly in conflict with the *Nelson* decision! The *Santos* decision is not only totally consistent with the *Nelson* decision, but indeed cites *Nelson* with approval.

to conjure up a conflict of statutory interpretation among the circuits. To the contrary, the present case is one of those happy instances where many different judges have read the same statute in exactly the same way—all in predictable accordance with its plain meaning. The question presented is the application of 28 U.S.C. § 1605(a)(2) to an extraterritorial tort committed against an American citizen. As the following inventory summarizes, each and every federal appellate court that has discussed this question has come up with the same answer:

SECOND CIRCUIT. The decedents bought a round-trip ticket for travel to China from an agent of the Chinese airline in the United States, although they were not guaranteed passage on a particular domestic flight in China. In China their ticket for a flight from Nanjing to Beijing was changed to a different flight that then crashed en route. The court found jurisdiction under 28 U.S.C. § 1605(a)(2) because the action for wrongful death in China was based upon the commercial activity in the United States of selling the round-trip ticket. *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11 (2d Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 453 (1987).

THIRD CIRCUIT. The plaintiff was detained and subjected to intolerable conditions in Mexico at the midpoint of his round-trip flight from New York. The court found that his purchase of the round-trip ticket in New York constituted "commercial activity" under 28 U.S.C. § 1605(a)(2), and further found that the extraterritorial tort was a breach of the common carrier's duty "based upon" the purchase of that ticket. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). This decision of eleven years ago, which has been extensively cited as a seminal interpretation of

the statute,[9] hardly conflicts with *Nelson* as the Petitioners suggest. Rather it is a precise precedent for the *Nelson* case. To reverse *Nelson* would be to upset eleven years of consistent federal court decisions that have followed the *Sugarman* precedent.

FIFTH CIRCUIT. The plaintiffs bought a vacation package tour in Florida on the national airline of the Dominican Republic. But when they arrived in the Dominican Republic, they were denied entry and tortiously manhandled by Dominican immigration officials who saw the plaintiffs' names on an official list of undesirable aliens. The court held that the plaintiffs' action was not "based upon" the commercial activity in the United States (selling a package tour ticket). For irrespective of the reason why the plaintiffs travelled to the Dominican Republic, the tort was committed because their names were on a list of undesirable aliens and not for any reason connected with or based upon the package tour. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

SEVENTH CIRCUIT. An American maintenance company had a lease with Air France, an instrumentality of the French government, to provide Air France with maintenance workers at Orly Airport in France. The plaintiff, an employee of the maintenance company, was injured while working at Orly Airport. The "commercial activity carried on in the United States," under 28 U.S.C. § 1605(a)(2), was the execution of the lease. However, the plaintiff did not claim any rights under the lease as a third party beneficiary or otherwise. Hence the court held that the plaintiff's claim was not "based upon" the lease. *Santos v. Compagnie*

[9] The most recent case following the *Sugarman* precedent appears to be *Schoenberg v. Exportadora de Sal*, 930 F.2d 777 (9th Cir. 1991).

Nationale Air France, 934 F.2d 890 (7th Cir. 1991). The court cited the *Nelson* case with approval, stating that in *Nelson*, unlike *Santos*, the employment contract was an element of the cause of action because Nelson's torture was for conduct within the scope of his employment duties. 934 F.2d at 894.

NINTH CIRCUIT. The decedent was hired as an engineer in the United States to work on a copper mining project in Iran. He was murdered as part of a political revolution that was taking place in that country. The court held that "[n]othing about his murder, however, related to his job, except to the extent his job had brought him to Iran in the first place." *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct. 510 (1984). Thus, this extraterritorial tort was not "based upon" the commercial activity of hiring the decedent in the United States. The *Nelson* court read 28 U.S.C. § 1605(a)(2) in exactly the same way as the *Berkovitz* court read it. If Berkovitz's death had been job-related in the sense that it occurred as a consequence of his duties as an employee, the *Berkovitz* court impliedly would have come out the same way as the *Nelson* court.[10]

[10] The Petitioners, without mentioning *Berkovitz*, rely on two other Ninth Circuit decisions:

(1) *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 237 (1989). This case involves the publication of a libelous article in a Soviet newspaper. The FSIA specifically grants foreign states complete immunity from "libel" under § 1605(a)(5)(B). The court found this immunity to exist regardless of whether the libel was based upon commercial activity in the United States. 871 F.2d at 1522 n.4. Hence *Gregorian* is totally inapposite to the present case.

(2) *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989). In this case, an Irish airline's commercial operations in the United States consisted of the sale of passenger

(Footnote continued on following page)

DISTRICT OF COLUMBIA CIRCUIT. The plaintiff, an engineer, was enticed to go to Ireland to develop his patented process. He signed a contract in the United States with the encouragement and participation of an instrumentality of the government of Ireland. After moving to Ireland, the plaintiff alleged that his expertise and patent rights were misappropriated. The court held that there was sufficient "commercial activity" under 28 U.S.C. § 1605(a)(2), and that the question on remand was the connection between the commercial activity and the extraterritorial tort of misappropriation:

> Section 1605's "based upon" standard is satisfied if plaintiff can show a direct causal connection between his enticement in the United States and the misappropriations in Ireland giving rise to his claims for an accounting . . .

Gilson v. Republic of Ireland, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982). The Petitioners interpret *Gilson* as requiring a "tighter fit" than other cases that have applied the "based upon" language. Petition at 19. Perhaps it is (since the actual facts had to be developed on remand, one cannot know). Even so, it is hard to imagine a "tighter fit" than the facts of the *Nelson* case where Mr. Nelson did the job he was hired to do and was tortured for doing it.[11]

---

[10] *continued*
tickets. The tort, however, was the airline's faulty maintenance work on an airplane engine in Ireland. The court held that the tort did not relate in any way to the airline's commercial activities in the United States and hence could not be "based upon" that commercial activity. *America West Airlines* is similarly inapposite to the present case.

[11] Petitioners also discuss a District of Columbia Circuit case handed down six years after *Gilson*: *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988). However, *Zedan*, as the

(Footnote continued on following page)

The preceding summary of appellate cases substantiates an observation made by the Supreme Court in the leading case on the Foreign Sovereign Immunities Act:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R. Rep. No. 94-1487, p. 7 (1976).[12]

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). Over the past fifteen years, federal courts have clarified the governing standards of 28 U.S.C. § 1605(a)(2) as applied to extraterritorial torts. The present case is, from a legal point of view, a wholly unremarkable part of that consistent federal jurisprudence.

---

[11] *continued*
Petitioners admit, is a contract case and not a case of extraterritorial tort. But even if *Zedan* were a tort case, its reasoning is nevertheless totally consistent with *Gilson*.

[12] This statement by the Supreme Court is ignored by the Petitioners, who flatly assert that "Congress's paramount purpose in enacting the FSIA was to ensure that United States courts do not assert jurisdiction over the sovereign acts of a foreign state." Petition at 23-24. Since the Petitioners devote so much time in their brief to the notion of Congressional intent, surely they should have consulted the *Verlinden* case before making such an unsupported declaration of what Congress intended. At the very least, they should have consulted their own thought processes. Had they done so, they would have realized that if Congress's "paramount purpose" was what they said it was, then Congress would have been better off in achieving such a goal by not enacting the FSIA at all. For under pre-FSIA law, foreign states enjoyed a wide ambit of immunity in American courts. The FSIA, as every lawyer in this field knows, was enacted to *restrict* that immunity.

V.

PETITIONERS' ATTEMPT TO WRAP THEIR CAUSE IN THE AMERICAN FLAG MAY MISREPRESENT THE PRESENT POSITION OF THE UNITED STATES.

The Petitioners assert, without qualification, that the present "position of the United States" (Petition at 8 n.7) is reflected in the Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing in Banc, which the Petitioners reprint as Appendix D to their Petition. If the Petitioners are correct, then why hasn't the United States joined them in their petition for a writ of certiorari? The Respondents understand, upon information and belief, that the Petitioners have in fact asked the Department of State and/or the Department of Justice to support their petition, and were turned down.

The story behind the government's decision to file a Statement of Interest in the Eleventh Circuit is directly relevant to the claim by the Petitioners that the United States supports their cause. Shortly after the decision in the Eleventh Circuit was handed down, the Ambassador from Saudi Arabia wrote to the United States Secretary of State, asking for support in this litigation. (The Petitioners have refused to make a copy of this letter available to this Court; *see* Appendix B.) The Legal Adviser to the State Department answered the letter on March 25, 1991, saying:

> I am writing in response to your letter of March 2 to Secretary Baker requesting that the United States support the Government of the Kingdom of Saudi Arabia in its request for a rehearing before the 11th Circuit in the case of *Nelson v. The Kingdom of Saudi Arabia*. The Department has reviewed the 11th Circuit opinion in this case and is currently considering whether to ask the Department of Justice to file a suggestion of interest requesting rehearing.

See Appendix C. Shortly after this letter was written, the Departments of State and Justice filed their joint Statement of Interest in the Eleventh Circuit.

Immediately thereafter, the Respondents wrote to the Department of Justice and also filed Motions in the Eleventh Circuit pertaining to the intervention by the United States in the lawsuit. The Respondents pointed out the clear inconsistency in the position taken by the United States. On the one hand, the United States was taking the position in its Statement of Interest that the *opinion and judgment* of the Eleventh Circuit, unless reversed, could have negative foreign policy ramifications. (The United States expressly disavowed taking a position on the merits of the case.)[13] On the other hand, in the same letter of March 25, 1991, the Legal Adviser offered the "good offices" of the Department of State to promote a settlement between the parties. The "good offices" of the Department of State is a classic institution in international law, to be accorded the highest diplomatic status as an official representation of the nation. The Legal Adviser stated in his letter:

> We would similarly welcome steps by the parties to resolve this dispute through a negotiated settlement. . . . To this end, the State Department is pleased to offer its good offices to facilitate such discussions.

Since a settlement would leave intact the Eleventh Circuit's opinion, the Respondents asked the Department of

---

[13] The United States says in its Statement of Interest: "We nevertheless wish to make clear at the outset that the United States takes *no* position regarding the underlying merits in this case." Petition at 38a.

Justice whether the United States preferred the case to be settled or to be reversed. The Department of Justice firmly replied that the offer of the "good offices" of the State Department to promote a settlement represented official United States policy. As for the other horn of the dilemma—the alleged difficulty in conducting foreign relations with the *Nelson* decision on record—the Department of Justice cited the vacation procedure of *United States v. Munsingwear*, 340 U.S. 36 (1950), saying that even if the parties settled the case the United States could still move the court for vacatur.

The Respondents immediately challenged the applicability of the *Munsingwear* line of cases, pointing out that vacatur is allowed, if at all, to a *party* to a dispute but never to an *amicus*. At any stage in the *Nelson* litigation (including the present petition for a writ of certiorari), a settlement would leave the United States alone, as *amicus*, to ask the court to vacate the judgment. But if that happened, the constitutional requirement of a case or controversy would not be met, because neither party to the litigation would be in court. The government in effect would be asking this Court for an advisory opinion. Clearly this Court would not entertain a motion by an *amicus* to vacate the *Nelson* judgment, even if the *amicus* is the United States.[14]

Accordingly, it is quite clear as a matter of law that the United States cannot claim an objective legal interest in having the *Nelson* case reversed at the same time that

[14] Even apart from the Case or Controversy barrier to vacatur in this case, a judicial opinion is a public act of the government; "[h]istory cannot be rewritten." *Memorial Hospital of Iowa County, Inc. v. United States Dept. of Health & Human Services*, 862 F.2d 1299, 1300 (7th Cir. 1988).

it is sincerely attempting to use the good offices of the Department of State to effectuate a settlement. Why, then, did the government offer to help settle the case and simultaneously file a Statement of Interest in the Eleventh Circuit? The Respondents' best guess is that the offer of the good offices of the Department of State was indeed sincere, while the submission of a Statement of Interest was a short-term political accommodation to the plea of an ally in the recently ended Persian Gulf War.

Now that the Eleventh Circuit has denied rehearing the case, the United States has affirmed to the Respondents its sincere desire to promote a settlement between the parties while apparently rethinking the alleged ramifications of the *Nelson* opinion for foreign policy. The decision by the United States *not* to join in the present petition for a writ of certiorari speaks louder than words that the Department of Justice has acknowledged the clash between its previous Statement of Interest filed in the Eleventh Circuit and the Department of State's offer to use its good offices to facilitate settlement discussions. Thus there is reason to conclude that the "foreign policy" interest asserted by the United States in getting this case reheard in the Eleventh Circuit may have been, at best, a transitory political response to the request by the Kingdom of Saudi Arabia for help in fighting its lawsuits.[15]

[15] There is further reason to believe that the executive branch has rethought its immediate reaction to the Eleventh Circuit's decision. It may have come to believe that the assertion of jurisdiction by an American court over the deliberate torture of an American citizen by a foreign government, when the torture was for doing the job the citizen was hired to do, is consistent with the proper conduct of the foreign policy of the United States and the image that the United States wishes to project to the international community. The United States not only condemns the torture of any

(Footnote continued on following page)

Although the Petitioners are fully aware of the entire history relating to the submission by the executive branch of its Statement of Interest, they have failed to disclose any of it to this Court. Instead, they boldly assert, utterly out of context, that the present position of the United States is reflected in the Statement of Interest filed in the Eleventh Circuit. By withholding disclosure of the relevant context and circumstances of filing of the government's Statement of Interest, the Petitioners may have attempted to mislead this Court as to their strong claim that the *Nelson* decision embarrasses the executive arm of the government in conducting foreign relations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ANTHONY D'AMATO
(Counsel of Record)
SCHOOL OF LAW
NORTHWESTERN UNIVERSITY
357 East Chicago Avenue
Chicago, Illinois 60611
Tel: (312) 503-8474
Fax: (312) 266-8305

Counsel for Respondents

[15] *continued*
human being anywhere, but also may now have no desire to send a message to foreign governments that if one of their nationals is ever tortured under color of law in the United States for doing the job that an instrumentality of the United States hired him to do, the United States will attempt to evade responsibility by raising a defense of sovereign immunity.

APPENDICES

APPENDIX A

REQUEST FOR ESPOUSAL OF CLAIMS.

April 29, 1991

The Honorable Edwin Williamson
Legal Adviser
United States Department of State
2100 K Street, N.W.
Washington, DC 20037-7180

Re: REQUEST FOR ESPOUSAL OF CLAIMS

Dear Mr. Williamson:

I am writing on behalf of my clients Scott and Vivian Nelson to request espousal of their claims by the United States against the Kingdom of Saudi Arabia.

Their claims are summarized by the Court of Appeals for the Eleventh Circuit in *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), and more particularly in their Complaint contained in the Record Excerpts in that case, copies of which are in the possession of the Department of Justice, c/o Stuart M. Gerson, Esq., and, I believe, in the files of Linda Jacobson, Esq., in your office.

I make this formal request with the clear understanding, as you undoubtedly know better than anyone else in the country, that espousal of the Nelsons' claims is legally irrelevant to their private litigation against Saudi Arabia, King Faisal Specialist Hospital, and Royspec. The espousal of claims on the international level is a government-to-government matter, in which individuals are not parties. Any reparations that you may obtain from the Kingdom

of Saudi Arabia are not necessarily measurable under international law by the actual damages incurred by Scott and Vivian Nelson; rather, they reflect the degree of injury suffered by the United States, perhaps approximated by the actual injuries suffered by the Nelsons. Any monies that may be paid over to the United States as a result of your successful espousal of the Nelsons' claims are not, as a matter of international law, required to be paid to the Nelsons. Whether such monies are actually paid over to the injured parties in nation-to-nation claim espousals is relegated by international law to domestic legislation and practice.

The fact that a government-to-government espousal of the claims of private citizens has no legal relevance to private litigation of the type that the Nelsons are currently pursuing, is in the interest of both parties. The Nelsons will not be legally disadvantaged in their private litigation if, despite your best efforts, you are unable to obtain redress on the diplomatic front from the Kingdom of Saudi Arabia. Similarly, if Saudi Arabia responds to your diplomatic efforts by paying damages to the United States, that fact will have no negative legal implication respecting Saudi Arabia's defenses to the Nelsons' claims in the private litigation.

To be sure, if damages are obtained as the result of your successful espousal of the Nelsons' claims, I will stipulate as follows: Any monies recovered by the United States and actually paid over to the Nelsons will be deducted from the amounts, if any, that the Nelsons may obtain against Saudi Arabia, King Faisal Specialist Hospital, and/or Royspec, by virtue either of a settlement entered into between the parties (whether or not facilitated by your good offices) or by virtue of successful prosecution of the Nelsons' claims upon remand to the federal district court.

As far as the Nelsons' continued pursuit of their claims against Saudi Arabia in American courts is concerned, you have already taken the position that American courts are an inappropriate forum. You are urging the Court of Appeals to reverse its decision in the Nelson Case. In light of your clear position on this question, the Department of State surely cannot delay its decision to espouse the Nelsons' claims on the ground that there is pending litigation in a forum which it regards as inappropriate. Moreover, American courts are not "local remedies" under international law with respect to the principle of exhaustion of local remedies, even though under the Foreign Sovereign Immunities Act the Nelsons are clearly entitled to remedies in a private commercial litigation against a non-immune sovereign defendant. Finally, the United States is not party to the case of *Nelson v. Saudi Arabia* in American courts. Indeed, it is my opinion that the Executive Branch of the United States lacks even a colorable "interest" in that litigation.

The Department of State was made aware of the Nelsons' claims in October, 1984. Considering the number of years that have elapsed, the Department of State has had ample time to assess the Nelsons' claims. May I remind you that you mentioned the possibility that the Department of State may espouse the Nelsons' claims, depending on the resolution of the question of exhaustion of local remedies, in your letter of March 25, 1991, to His Excellency Bandar bin Sultan, Ambassador of the Kingdom of Saudi Arabia.

Please permit me to summarize the requests of Mr. and Mrs. Nelson to the espousal of their claims by the United States, and to comment on the question of the exhaustion of local remedies in each instance. I make the following remarks to some extent on the basis of information con-

veyed to me by Mr. and Mrs. Nelson, but without detailed study of the voluminous records, memos, and tape recordings currently in their possession. If necessary, I will make such a study. I would expect, however, that the general points that I shall make will accord with the information in your own files. In any event, I make the following representations in good faith, subject to corroboration and correction, if necessary, by the documentary evidence.

I. THE CLAIMS OF VIVIAN NELSON.

Vivian Nelson's claims are summarized by the Eleventh Circuit, 923 F.2d at 1530. Her claims are detailed in the Complaint to which I referred earlier. While separate and distinct from her husband's claims, Mrs. Nelson's claims arise from similar underlying facts and are inextricably intertwined with the claims of her husband.

On the question of Mrs. Nelson's exhaustion of local remedies, I quote from my recently filed motion to exclude your Statement of Interest in *Nelson v. Saudi Arabia:*

> Vivian Nelson is a co-Appellant in the present case. Her claim is inseparable from that of her husband. The Department of State must be charged with awareness that there is no "appropriate forum" in Saudi Arabia for Mrs. Nelson because she would be deprived of elementary due process of law in any Saudi court. A woman's testimony in a Saudi court is valued at only one-half that of a man's testimony. See Department of State, *Country Reports on Human Rights Practices for 1989* at 1557 (legal practices in Saudi courts)..

If Mrs. Nelson were to seek private redress in a Saudi court against the man who told her that he would sponsor her husband's release from prison in return for sexual favors, what chance would she have of prevailing in her

claim against him when his testimony is accorded, by Saudi law and practice, double the value of her testimony?

As you know, the Department of State and the Department of Justice filed a Statement in opposition to my motion, taking issue with all of the points I raised except the point about Mrs. Nelson. Your brief is conspicuously and glaringly silent about Mrs. Nelson's claim. Its silence leaves an uncomfortable gap in the Court of Appeals' ability to evaluate the statement your Department made that the Department retains the option of espousing the plaintiffs' claims against Saudi Arabia pending the resolution of the question of exhaustion of local remedies. And it leaves co-plaintiff Mrs. Nelson in the dark as well.

I am confident that the Department of State would agree with me that Mrs. Nelson does not deserve to be treated as a non-person. I am sure that the Department of State will appreciate that her claim, recognized by the Eleventh Circuit in its opinion of February 21, 1991, is as worthy of consideration on the diplomatic level by the government of the United States as is her husband's claim.

In short, I believe that Vivian Nelson, a law-abiding citizen of the United States, is entitled to a yes or no answer to the following question: Does the Department of State insist that Vivian Nelson must first exhaust local remedies in a foreign court system that values her testimony at one-half that of a man's testimony before it will undertake to espouse her claim against the Kingdom of Saudi Arabia?

I would appreciate your letting me know your answer so that I can communicate it to Mrs. Nelson.

I would very much hope that your answer to the question will be in the negative, and that you will undertake

forthwith to espouse Mrs. Nelson's claims against Saudi Arabia. In light of the six and a half years that have passed, the full and continuing notice that the Department of State has been given about the Nelsons' claims, the exhaustion of the Nelson's family assets, and their plunge into extreme indebtedness to cover Mr. Nelson's hospital bills, any further delay just for the sake of delay would surely be regrettable.

II. THE CLAIMS OF SCOTT NELSON.

Scott Nelson's claims, like those of his wife, are summarized in the opinion of the Court of Appeals for the Eleventh Circuit and detailed in his Complaint filed with the district court and incorporated in the Record Excerpts filed with the Court of Appeals.

The Department of State has been aware of his claims ever since he was released from a Saudi prison in 1984 through the intervention of Senator Kennedy. Mr. Nelson has consistently and persistently petitioned your Department for its help and assistance in obtaining redress from the Kingdom of Saudi Arabia.

Upon his return to the United States in 1984, Mr. Nelson obtained from the Department of State a list of seventeen Saudi lawyers or law firms who might pursue his claim in Saudi courts. He wrote to each of them. Five responded by telephone, declining his case. Three responded by letter, declining his case. The others did not respond.

Any attempt by Mr. Nelson to pursue his claims in a Saudi court would be heavily dependent upon the existence of substantial documentary evidence. Many original documents, memos, telegrams, official papers, and other evidence were compiled and stored in the United States

Embassy in Riyadh, Saudi Arabia. However, in 1987, that Embassy destroyed Mr. Nelson's entire file. In your Department's opposition to my Motion filed with the Eleventh Circuit, you have claimed that the Riyadh documents "were destroyed pursuant to routine embassy security procedures," and added that the State Department "has maintained files on the Nelson matter in its facilities in Washington, D.C." It would appear, however, that if the Department cared about helping Mr. Nelson it would have prevented the occurrence of the purported "routine procedures." Moreover, the files that have been "maintained" in Washington D.C. do not contain copies of the original evidence that was destroyed in Riyadh. It is quite evident that Mr. Nelson's ability to pursue local remedies in Saudi courts has been substantially impaired by the deliberate destruction of his files.

Several years later, your Department again urged Mr. Nelson to get a Saudi lawyer to prosecute his claims. The Department presented to Mr. Nelson a list of seventeen attorneys to contact who might help him in Saudi courts. According to Mr. Nelson, the list was identical to the list that had been given to him years earlier. Nevertheless, he wrote again to each of the attorneys on the list. He obtained the same negative results. All that was accomplished was a further deterioration of his financial assets and human spirit. One attorney Mr. Scott contacted, Haig V. Kalbian, wrote directly to Mr. John Knox of the International Claims section of your Department, on April 6, 1989. Mr. Kalbian said, "No Saudi attorney that I am aware of would jeopardize his practice, and some would argue his life to take on such a case."

Quite apart from the question of exhaustion of local remedies is the issue of whether Mr. Nelson in fact was tortured. In your Statement of Interest filed with the

Court of Appeals, there is a statement on page 4 that "The record reveals, however, that there is sharp disagreement regarding the facts underlying plaintiffs' claims." Then after referring to the issue of exhausting local remedies, the Statement of Interest goes on to say, "the United States retains the option of espousing plaintiffs' claims against Saudi Arabia—if it finds them to have merit—as an official matter between the two governments" (at p. 5). The juxtaposition of these two sentences gives rise to the clear inference that your Department is skeptical about whether Mr. Nelson was in fact tortured.

I am at a loss to imagine where that skepticism comes from, since Mr. Nelson has consistently provided you with copies of medical records and reports detailing his medical evaluations and treatments. If your Department has failed to read those reports, then it should not have communicated to the Court of Appeals, even by inference, its skepticism about the merits of Mr. Nelson's claims. Such a communication can be highly prejudicial to the rights of one party in an entirely private litigation. The Court of Appeals might naturally assume that your Department, after six and a half years of persistent appeals for help by Mr. Nelson, would only write the two sentences above quoted, with their skeptical implication, if the Department had some evidence in its possession upon which to base its skepticism. On the other hand, if it was not your intention to convey to the Court of Appeals the suggestion that after six and a half years you have reason to be skeptical about the merits of Mr. Nelson's claims, then I respectfully suggest that you might consider removing the prejudicial impact of that implication by a letter addressed to the Court.

There can be no real question that Mr. Nelson was in fact tortured. The proof is incontrovertible. You have most

of it in your possession. Please allow me to recapitulate the main points.

Let us first consider whether there is any medical evidence that Mr. Nelson was *not* tortured. I have asked this question of the attorneys for the Kingdom of Saudi Arabia. They have provided me with the sole document upon which they rest their entire case that Mr. Nelson was not tortured. It is a 7-page report by Ledford Gregory, a doctor hired by Hospital Corporation of America in connection with the case of *Nelson v. Hospital Corp. of America*. Dr. Gregory examined Scott Nelson on January 27, 1990. Mr. Nelson says that the examination lasted fifteen minutes. Dr. Gregory reviewed some of Mr. Nelson's medical records, noting that there were many critical records that he had not read. He reported that there had been arthroscopic procedures in the internal knee joints. Dr. Gregory suggested that Mr. Nelson's pain is exaggerated, but he did not conclude that Mr. Nelson had not been tortured.

In contrast, Mr. Nelson has been examined by at least nine doctors, has undergone invasive reconstitutive knee surgery three times, and is presently diagnosed as requiring additional knee surgery. Mr. Nelson has provided you with the depositions of two doctors who have thoroughly examined him over a period of time. Dr. Dan R. Chartier, a psychologist and psychophysiologist in North Carolina and a clinical assistant professor in the School of Medicine at the University of North Carolina in Chapel Hill, in a 112-page deposition, found that Mr. Nelson experienced post-traumatic stress syndrome such as that of some Vietnam war veterans. This was measured by muscular contractions in terms of microvolt readings, and galvanic skin responses measured in micromode conductance. Dr. Alan Spanos, a physician specializing in the management

of chronic pain, graduated from Oxford University and has taught and done research at Duke Medical Center. In his 121-page deposition, he testified that Mr. Nelson has a diffuse nerve injury causing his brain to receive messages of intense pain. He stated that his findings were consistent with the process of torture that Mr. Nelson described. Dr. Spanos said that Mr. Nelson's injuries were unlikely to have been caused by a car accident or a sports injury, because those injuries produce localized, and not diffuse, conditions. Mr. Nelson had gross derangements in the knees, according to Dr. Spanos. In sports injuries, there would be signs of the knee being forcefully struck from the side. In Mr. Nelson's case, however, the internal "clockwork" of the knees was deranged without external evidence of trauma. His injuries would be consistent with a pulling injury to the knee which would not do much damage to the outside structures but which could damage the internal structures. Mr. Nelson had a partially torn lateral meniscus, a partially torn anterior cruciate ligament and chronic synovitis (internal inflammation). Dr. Spanos observed that these injuries were partially corrected by invasive reconstitutive surgery.

Most importantly, there are two wholly objective evaluations—one medical, the other legal—that furnish as convincing a proof of Mr. Nelson's torture as could be furnished for anyone's torture. The first is a report, a copy of which Mr. Nelson sent to your Department, of the Center for Victims of Torture, a Minneapolis non-profit corporation. Mr. Nelson was thoroughly evaluated by the Center in April, 1990. I would like to quote for you the summary report of Dr. Barbara Chester:

> Scott Nelson was initially seen at the Center For Victims of Torture on April 9, 1990. In addition to an initial screening and intake interview conducted

by the Center's clinical director (Barbara Chester, Ph.D. LCP), Mr. Nelson completed the Center's entire evaluation procedure which consists of a medical assessment (Neal Holtan M.D.), psychiatric assessment (James Jaranson, M.D.), and psychological testing (Rosa Garcia Pel oniemi, Ph.D. LCP). Mr. Nelson was seen at the Center on Monday, April 9th for intake, screening, and psychiatric assessment, Tuesday, April 10th and Thursday April 12th for psychological testing and interpretation, and Friday, April 13th for medical assessment and a final information session.

The Center For Victims of Torture relies upon the definition of torture developed by the World Medical Association as a guideline for eligibility of prospective clients. According to this definition, which involves the deliberate and systematic infliction of physical and/or mental suffering, Mr. Nelson is qualified to receive services at this Center.

Mr. Nelson's evaluation and interview responses are consistent with his reported history of detention and torture in Saudi Arabia in 1984, and quite similar to the responses and reactions reported by other clients. Mr. Nelson was diagnosed as suffering from Post-traumatic Stress Disorder (delayed) (309.89), and Major Depression (296.2), according to the criteria specified in the Diagnostic and Statistical Manual, Third Edition-Revised, of the American Psychiatric Association (DSM-111-R). These symptoms include severely disturbed sleep pattern, nightmares, unwanted and intrusive recollections of his experience, exaggerated startle response, and difficulty concentrating. The client also describes symptoms of anxiety including discrete panic episodes, including rapid heart rate, sweating, and chest heaviness, most frequently occurring after nightmares. The environmental stressors contributing to these disorders were rated as "catastrophic" according to the same DSM-111-R guidelines.

> Mr. Nelson appears to be an intelligent, open and direct person. Although he is well oriented to reality, his symptoms are not likely to improve significantly without appropriate intervention.

There is one other report that I want to call to your attention, because it is the only one that Mr. Nelson has not sent in to your Department. It is the decision of Administrative Law Judge David P. Tennant, dated September 14, 1990, of the Office of Hearings and Appeals of the United States Social Security Administration, Department of Health and Human Services. A full copy of Judge Tennant's decision is appended to this letter.

Judge Tennant held that Scott J. Nelson, claimant, met the disability insured status requirements of the Social Security Act beginning on September 27, 1984, the day he claimed he was tortured. Moreover, the severity of his impairments met the requirements of §§ 12.04, 12.06, and 12.07, Appendix I, Subpart P, Regulations No. 4 of the Act, and has precluded Mr. Nelson from working for at least 12 continuous months (20 CFR 404.1525).

As you are aware, Administrative Law judges in the Department of Health and Human Services must pass upon many disability claims, and a number of them are spurious. Those judges are uniquely qualified by virtue of their specialized experience to evaluate the sincerity of disability claimants. I would like to quote some pertinent sections of Judge Tennant's decision:

> The Administrative Law Judge further finds that the claimant has impairments including chronic low back pain with pain in the lower extremities, an affective disorder, and anxiety related disorder, and a somatoform disorder. The claimant's impairments, in combination, are "severe" because they limit the claimant in his ability to sit, stand, walk, lift and carry,

> maintain the activities of daily living, maintain social functioning, maintain concentration, persistence, and pace, and avoid deterioration or decompensation in work or work-like settings. . . .
>
> The evidence establishes that the claimant was hospitalized initially in November 1984 for treatment of pain in the left knee. At that time, he was diagnosed as having an internal derangement of the left knee with a partially torn lateral meniscus and a partially torn anterior cruciate ligament. During the hospitalization, an arthroscopy with a partial meniscectomy and partial resection of the cruciate ligament with a partial synovectomy was performed to the left knee. The claimant then received emergency treatment in November 1986 for complaints of chest pain, although an electrocardiogram was normal (Exhibits 14 and 15). . . . An arthrogram of the right knee later that month [August 1986] showed a tear of the medial meniscus. An arthroscopy with a partial meniscectomy and a partial synovectomy was performed to the right knee in September 1986. . . .
>
> The evidence shows that since the alleged onset date of disability the claimant has had a disturbance of mood accompanied by anhedonia, appetite disturbance with change in weight, sleep disturbance, psychomotor agitation, decreased energy, feelings of guilt and worthlessness, difficulty concentrating and thinking, and thoughts of suicide as required by section 12.04; anxiety with generalized persistent anxiety accompanied by autonomic hyperactivity and apprehensive expectation, a persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation, recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror, and sense of impending doom occurring on the average of at least once a week, recurrent obsessions or compulsions which are a source of marked distress, and recurrent and intrusive recollec-

tions of a traumatic experience which are a source of marked distress as required by section 12.06; and physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms as evidenced by unrealistic interpretations of physical signs or sensations associated with the preoccupation or belief that the claimant has a serious disease or injury as required by section 12.07. . . . [T]he Administrative Law Judge finds that the claimant's mental impairments, in combination, produce a marked restriction in the activities of daily living, marked difficulties in maintaining social functioning, frequently occurring deficiencies of concentration, persistence, or pace, and repeated episodes of deterioration or decompensation in work or work-like settings. According to the testimony of the claimant's wife and according to his own testimony, his daily activities are extremely limited and she must assist him with dressing and bathing. In addition, although the claimant was quite active socially prior to his arrest and torture, he engages in few social activities at the present and does not even participate in social activities with his wife and son. He has diminished concentration as documented by his treating mental health professionals and he has had repeated episodes of deterioration or decompensation in work or work-like settings. Therefore, the Administrative Law Judge finds that the claimant's impairments are of a severity to meet the requirements of sections 12.04, 12.06, and 12.07. . . .

To all this evidence I wish to add an observation of my own. It concerns a piece of evidence that is conspicuous because it is missing—like the famous Sherlock Holmes story about the hound that did not bark in the night.

The Nelsons took up their new home in Riyadh, Saudi Arabia, in 1983 with their infant son Matthew. Like many American families—like my own family, in fact—the Nelsons wanted two children. But a brutal, inhuman torturing

of Mr. Nelson intervened. The Nelsons never had a second child. The neurological explanation can be left to the imagination. The fact is that the absence of that second child in the Nelson family speaks louder than all the self-serving allegations in the world challenging his claim of torture.

For the foregoing reasons, I ask the United States to espouse the claims of Scott and Vivian Nelson with the Kingdom of Saudi Arabia. In your diplomatic representations to the Kingdom, you may wish to point out that some members of the Royal Family were among the patients at the King Faisal Specialist Hospital when Mr. Nelson reported the existence of dangerous grease valves in the patients' oxygen supply lines. For his service to them and to all the patients in the hospital, he deserved a medal of commendation. Instead, he was tortured. By universally acknowledged standards of justice and fairness, the Kingdom of Saudi Arabia should generously compensate the United States for the injuries sustained by Mr. and Mrs. Nelson, and in addition to financial compensation—which cannot hope to make up for deliberate torture—should express its regrets to the United States of America for the behavior of those persons who, acting under color of law in Saudi Arabia, so shockingly violated Scott and Vivian's fundamental human rights.

Sincerely,

Anthony D'Amato
Counsel for Scott and
Vivian Nelson[16]

---

[16] As of the date this Brief in Opposition is filed in the Supreme Court, the Department of State has responded only that the foregoing Request for Espousal of Claims is under review.

APPENDIX B

LETTER OF MARCH 2, 1991, FROM HIS EXCELLENCY BANDAR BIN SULTAN TO THE HONORABLE JAMES A. BAKER III.

[*The Department of State notified the Respondents that it would make this letter available to the Respondents, providing that the attorneys for Saudi Arabia agreed. The Respondents thereupon made four separate written requests to the attorneys for Saudi Arabia, stating in the most recent request that the letter would be reprinted in the appendix to this Brief. However, the attorneys for Saudi Arabia have refused to provide a copy of the letter.*]

APPENDIX C

LETTER OF MARCH 25, 1991, FROM THE HONORABLE EDWIN D. WILLIAMSON, THE LEGAL ADVISER, TO HIS EXCELLENCY BANDAR BIN SULTAN, AMBASSADOR FROM THE KINGDOM OF SAUDI ARABIA.

March 25, 1991

Dear Mr. Ambassador:

I am writing in response to your letter of March 2 to Secretary Baker requesting that the United States support the Government of the Kingdom of Saudi Arabia in its request for a rehearing before the 11th Circuit in the case of *Nelson v. The Kingdom of Saudi Arabia*. The Department has reviewed the 11th Circuit opinion in this case and is currently considering whether to ask the Department of Justice to file a suggestion of interest requesting rehearing. In making our decision, the Department will give careful consideration to the arguments raised by the Kingdom of Saudi Arabia concerning interpretation of sovereign immunity, as expressed in your letter.

Regardless of the ultimate decision of the United States Government on whether to express any views in the litigation currently pending before the 11th Circuit, the Department, which has taken no position on the merits of Mr. Nelson's claim, has long been of the view that it would be appropriate for Mr. Nelson to resolve his dispute either through the Saudi legal system or through a negotiated settlement. Regrettably, however, there has been very little progress to date along either of these avenues.

As for litigation in Saudi Arabia, we have consistently told Mr. Nelson that the Department of State may not, under international law, espouse the claim of a U.S. citizen against a government of a foreign state unless the citizen has exhausted all local remedies available in that state or shown that recourse to local remedies would be futile. Accordingly, we have encouraged Mr. Nelson to present his claim to the Saudi Board of Grievances, which we understand to be the appropriate forum in Saudi Arabia for adjudication of this dispute. Mr. Nelson contends, however, that he has been unable to find a qualified lawyer who is willing to take his case. As a result, Mr. Nelson attempted on November 3, 1990, to have the Board of Grievances adjudicate his case solely on the basis of documentary materials. Citing Mr. Nelson's failure to appear, either personally or through a representative, the Board dismissed the case. Although the Department has not yet taken a position on whether, under the circumstances, Mr. Nelson can be deemed to have exhausted available local remedies, we are concerned about the apparent difficulty he has faced in securing a legal representative in Saudi Arabia. We would welcome any ideas your government may have on how we might assist Mr. Nelson in this regard.

We would similarly welcome steps by the parties to resolve this dispute through a negotiated settlement. Mr. Nelson has informed the Department that he is willing to meet with officials of the Government of Saudi Arabia, either in the United States or in a mutually agreeable third country, to discuss possible settlement of his case. We are unaware, however, of any serious settlement discussions to date. Mr. Nelson has stated what while he did meet with a lawyer retained by the Saudi Embassy in 1987, this was to formulate his claim for presentation

in Saudi Arabia, not to discuss settlement. Particularly in light of the difficulties Mr. Nelson has faced in bringing his claim in Saudi Arabia, we think it would prove beneficial for the parties to sit down together to review the claims and evidence and to exchange views. To this end, the State Department is pleased to offer its good offices to facilitate such discussions.

Sincerely yours,
Edwin D. Williamson